United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7228

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7228

CALLMAN GOTTESMAN AND PAUL J. PEYSER,
Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION AND
E. I. DU PONT DE NEMOURS & COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
NOV 17 1977
SECOND CIRCUIT

BRIEF OF APPELLEE
E. I. du PONT de NEMOURS & COMPANY

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November 17, 1977

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATUTES	iv
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. An Award Of Counsel Fees In A Case Such As This Must Be Explicitly Authorized By Statute; The Applicable Statute, Section 4 Of The Clayton Act, Precludes An Order Against Du Pont, The Prevailing Party	3
II. Du Pont Cannot Be Required To Pay A Fee Under Appellants' Theory That It Was A Fiduciary Required To Provide An Accounting	6
III. There Is No Basis For Directing Du Pont To Bear Expenses For Appellants' Final Report To The District Court	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Alphin v. Henson, 538 F.2d 85 (4th Cir. 1976)	5
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240 (1975)	3, 4
Arcambel v. Wiseman, 3 U.S. 306 (1796)	4
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	8
Byram Concretetanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649 (3rd Cir. 1967)	5
Decorative Stone Co. v. Building Trade Council, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928)	5
F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116 (1974)	4

Page

FLM Collision Parts, Inc. v. Ford Motor Co., 411 F. Supp. 627 (S.D.N.Y. 1976) 6
Gottesman v. General Motors Corp., 436 F.2d 1205 (2d Cir. 1971) 2, 6, 7, 8
Gottesman v. General Motors Corp., 430 F. Supp. 1047 (S.D.N.Y 1977) 3
Gottesman v. General Motors Corp., 310 F. Supp. 1257 (S.D.N.Y. 1970) 6
Gottesman v. General Motors Corp., 279 F. Supp. 361 (S.D.N.Y. 1967) 6, 7, 8
Greene Cty. Planning Board v. FPC, 46 U.S.L.W. 2041 (2d Cir. Nos. 76-4151 and 76-4153, 1977) 5
In re Heller, 10 Misc.2d 363 (N.Y. County Sup. Ct. 1948) 7
In re Osborne, 18 A.D.2d 973 (1st Dept. 1963) 7
Kennedy v. Emerald Coal & Coke Co., 30 A.2d 269 (Del. Ch. 1943) 7
Koratron Co., Inc. v. Lion Uniform, Inc., 409 F. Supp. 1019 (N.D. Cal. 1976) 5
Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 Trade Cases ¶ 60,551 (S.D.N.Y. 1975) 6
Milgram v. Lowe's Inc., 192 F.2d 579 (3d Cir. 1951) *cert. denied,* 343 U.S. 929 (1952) 5
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) ... 5
Perkins v. Standard Oil Co. of Cal., 399 U.S. 222 (1970) 5
Phillips v. Crown Central Petroleum Corp., 426 F. Supp. 1156 (D. Md. 1977) 5
Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973) 5
Schenectady Trust Co. v. Emmons, 263 App. Div. 542 (N.Y. 1942) 7
United States v. Du Pont & Co., 353 U.S. 586 (1957).. 8
Vandervelde v. Put and Call Brokers and Dealers Assn., 344 F. Supp. 157 (S.D.N.Y. 1972) 5
Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 1973-2 Trade Cases ¶ 74,668 (S.D. Tex. 1972) 6

STATUTES:

15 U.S.C. § 15 (1970) 5, 6
28 U.S.C. § 1920 (1970) 4
28 U.S.C. § 1923 (1970) 4

Page

MONOGRAPHS, SERVICES AND TREATISES:

ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act—Policy and Law* (1977) 6
90 C.J.S. *Trusts* § 420 (1955) 7
3 *Scott on Trusts* §§ 188.4, 188.6, 245 (3d ed. 1967) ... 7
3 Trade Reg. Rep. (CCH) ¶ 9320 5

Section 4 of the Clayton Act

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. § 15 (1970).

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Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION AND
E. I. DU PONT DE NEMOURS & COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE E. I. du PONT de NEMOURS & COMPANY

ISSUE PRESENTED FOR REVIEW

Whether plaintiffs, having failed to establish that Du Pont's ownership of stock in General Motors caused any injury to General Motors, are nonetheless entitled to recover legal fees and expenses from Du Pont.

STATEMENT OF THE CASE

In June 1957, shortly after the Supreme Court held that Du Pont's ownership of stock in General Motors constituted a violation of Section 7 of the Clayton Act, plaintiffs brought a lawsuit charging that Du Pont had used its stock holdings in General Motors to injure that company in numerous commercial transactions. By stipulation of counsel, the trial held in the winter of 1966-1967 was limited to consideration of plaintiffs' primary claims pertaining to the sale of automotive fabrics and finishes used in the manufacture of passenger cars.[1] The trial court held that Du Pont had not injured General Motors and therefore plaintiffs' claims relating to automotive fabrics and finishes should be dismissed. This court affirmed. *See Gottesman* v. *General Motors Corp.*, 436 F.2d 1205 (2d Cir. 1971). After the Supreme Court denied certiorari, 403 U.S. 911 (1971), Du Pont moved for summary judgment on or dismissal of all remaining causes of action. Following Du Pont's voluntary submission of information plaintiffs' counsel had requested for the purpose of testing the validity of those motions, plaintiffs reported to the court below that they had no reasonable prospect of proving that General Motors had suffered any injury and that, accordingly, it would not be in the best interest of General Motors and its stockholders to continue the litigation. After notice of hearing was mailed to General Motors shareholders, the district court on January 23, 1976 issued a judgment of dismissal with prejudice, reserving to plaintiffs the right to file within 60 days an application for attorneys' fees.[2]

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[1] The Supreme Court's decision that Du Pont's ownership of 23 percent of General Motors stock violated Section 7 of the Clayton Act included a finding that automotive fabrics and finishes constituted the line of commerce in which trade might be restrained as a result of the corporate relationship; no findings were made as to the other products that had been the subject of evidence at trial.

[2] Appellants' Appendix ("Appendix") at 47a-48a.

Plaintiffs' application for attorneys' fees was denied[3] by the District Judge who had been assigned to this case in 1959 and had presided at all subsequent proceedings.[4]

ARGUMENT

The brief filed by General Motors, which Du Pont fully supports, sets forth the factual and legal reasons why legal fees and expenses cannot properly be awarded against General Motors. This brief will show that Du Pont cannot under any circumstances be ordered to pay the fees and expenses of a wholly unsuccessful effort to establish that it caused injury to General Motors.

I. An Award Of Counsel Fees In A Case Such As This Must Be Explicitly Authorized By Statute; The Applicable Statute, Section 4 of the Clayon Act, Precludes An Order Against Du Pont, the Prevailing Party.

With exceptions not applicable here,[5] it has always been the position of the United States courts that each litigant

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[3] The district court's judgment of April 6, 1970 dismissing the causes of action in automotive fabrics and finishes had awarded costs to the defendants. *See* Appellants Appendix in Docket No. 34982, Vol. III, at 571a. At the time the district court affirmed dismissal of the remaining causes of action, there were pending General Motors' and Du Pont's motions to tax costs in the total amount of $35,691.75. Appellants "requested the Court in its discretion" to deny costs. Appendix in this case at 41a. The court granted this request and declined to tax costs in an order entered on September 20, 1976.

[4] The application of the appellants in No. 77-7228 (the "Netter appellants"), brought in the name of plaintiffs below and filed on April 22, 1976, was denied by the court's order of April 12, 1977. *See* Gottesman v. General Motors Corp., 430 F. Supp. 1047 (S.D.N.Y. 1977); Appendix at 119a. The application of the appellant in No. 77-7428 ("appellant Lee"), which had been filed on March 10, 1972 and held in abeyance by agreement, was denied by the court's unpublished order of July 13, 1977. These appeals, which present identical questions of law and fact, were consolidated upon appellees' joint motion.

[5] Those exceptions allow assessment of a fee against a party who has benefitted by the litigation or as a penalty for bad faith or disobeying a court order. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240, 257-59 (1975). Du Pont did not stand to benefit from the successful prosecution of the appel-

must bear its own attorneys' fees. Under this "American rule," even the prevailing party pays its own attorneys' fees unless a statute explicitly allows the imposition of those fees on the losing party. *E.g., F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 126-31 (1974); *Arcambel* v. *Wiseman*, 3 U.S. 306 (1796).[6] That rule accordingly applies here with the greatest possible force, as the party seeking an attorney's fee has suffered an adverse judgment on the merits.

The rule was most recently discussed in detail in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y.*, 421 U.S. 240 (1975), and was reaffirmed as "deeply rooted in our history and in congressional policy," 421 U.S. at 240. The Court declared:

> "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262.
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> * * *
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> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." 421 U.S. at 269.

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lants' claims; on the contrary, had appellants been successful, Du Pont would have suffered the imposition of an enormous and unprecedented liability. Appellants do not and could not contend that Du Pont willfully disobeyed a court order or acted in bad faith. Indeed, the Netter appellants explicitly recognize that Du Pont properly adopted a "hard adversary position . . . . It was the target and might have been compelled to pay enormous sums." (Brief at 25.)

[6] This rule was codified in the Act of February 26, 1853, 10 Stat. 161, and is now found in 28 U.S.C. §§ 1920(a), 1923; it generally limits assessments of the prevailing party's litigation expenses to taxable costs.

See also Greene Cty. Planning Board v. *FPC*, 46 U.S.L.W. 2041 (2d Cir., Nos. 76-4151 and 76-4153, 1977).[7]

Appellants accordingly cannot obtain an award against Du Pont without legislative authorization. Not only are they unable to cite any statutory support for their claim, but they entirely ignore the applicable statute, whose terms demonstrate the utter lack of merit in appellants' case. That statute is Section 4 of the Clayton Act, 15 U.S.C. § 15, which clearly precludes any award against Du Pont.

Section 4 creates an incentive, analogous to a contingent fee, for the prosecution of private antitrust suits, but it authorizes an award only in a "successfully prosecuted private antitrust action." *Perkins* v. *Standard Oil of Cal.*, 399 U.S. 222, 223 (1970). In the form applicable to this case,[8] the Clayton Act allows an attorney's fee award only when treble damages have been assessed.[9] Even if recovery is secured on some, but not all of the antitrust claims advanced, "[t]he fee awarded should not include compensation for time expended upon theories of liability or overdrawn items of damage ultimately rejected by the trier of fact."[10] In short,

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[7] The contention of appellant Lee (Brief at 5) that Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), controls cannot be sustained. As the Supreme Court noted in *Alyeska*, 421 U.S. at 258, *Mills* allowed the assessment of an attorney's fee against the beneficiary of a successful lawsuit.

[8] The Hart-Scott-Rodino Antitrust Improvements Act of 1976 prospectively entitled antitrust plaintiffs to recover a reasonable attorney's fee if they obtain injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 17. *See* 3 Trade Reg. Rep. (CCH) ¶ 9320. Previously, attorneys' fees were unavailable for efforts that resulted in the issuance of an injunction in a private antitrust case. *E.g.*, Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973); Milgram v. Lowe's Inc., 192 F.2d 579, 586-87 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); Decorative Stone Co. v. Building Trade Council, 23 F.2d 426, 428 (2d Cir.), *cert. den.* 277 U.S. 594 (1928).

[9] *E.g.*, Alphi .. Henson, 538 F.2d 85, 86 (4th Cir. 1976); Byram Concrete-tanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649, 651 (3d Cir. 1967); Koratron Co., Inc. v. Lion Uniform, Inc., 409 F. Supp. 1019, 1029 (N.D. Cal. 1976).

[10] Vandervelde v. Put and Call Brokers and Dealers Assn., 344 F. Supp. 157,

> "no award of attorneys' fees can be made under Section 4 of the Clayton Act except for services related to the successful recovery of treble damages under that section. In other words, no award can be made under the statute for work devoted exclusively to the pursuit of injunctive relief or of unsuccessful theories of liability." *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 411 F.Supp. 627, 633 (S.D.N.Y. 1976).[11]

The authority of the Court to assess a fee against the defendant under Section 4 is therefore wholly dependent, as the statute states, on the plaintiff's success in showing that it has been "injured in his business or property by reason of" an antitrust violation. The appellants lost on the merits and therefore Section 4 precludes the assessment of a fee against Du Pont, the successful antitrust defendant.

II. Du Pont Cannot Be Required To Pay A Fee Under Appellants' Theory That It Was A Fiduciary Required To Provide An Accounting.

There is no support for the Netter appellants' present theory that they should be awarded an attorney's fee because they required Du Pont to perform an accounting in an alleged fiduciary capacity. (Brief at 40, 43.)

The trial court held, and this court agreed, that Du Pont did not breach any fiduciary duty in its sales of automotive fabrics and finishes to General Motors. *Gottesman* v. *General Motors Corp.*, 279 F. Supp. 361, 383 (S.D.N.Y. 1967), 310 F. Supp. 1257, 1260 (S.D.N.Y. 1970), *aff'd*, 436 F.2d 1205, 1212 (2d Cir. 1971). The trial court observed that "the mere fact of du Pont's ownership of 23% of General

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160 (S.D.N.Y. 1972). *Accord*, Phillips v. Crown Central Petroleum Corp., 426 F. Supp. 1156 (D. Md. 1977); Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 Trade Cases ¶ 60,551 (S.D.N.Y. 1975); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 1973-2 Trade Cases ¶ 74,668 (S.D. Tex. 1972).

[11] *See generally*, ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act—Policy and Law* 14 (1977).

Motors stock and the election of several of its nominees as directors is not enough to impose a fiduciary duty upon du Pont." However, it went on to conclude on the basis of the trial record that "even if du Pont was a fiduciary, it has carried its burden and it has not violated any fiduciary duty." 279 F. Supp. at 384-385. This finding was expressly affirmed. *See* 436 F.2d at 1212.

Having demonstrated that no violation of a fiduciary obligation occurred, Du Pont is at worst in the position of a fiduciary who has been fully cleared of all charges of wrongdoing. In effect, appellants' claim is based on the wholly untenable position that a fiduciary, whenever charged with a breach of trust, must pay the plaintiffs' attorneys fees, even if the charges are determined to be baseless. Any such rule would invite and reward wholly unwarranted claims against fiduciaries.

The authorities on the law of trusts cited by the Netter appellants (Brief at 33-34, 43-44) lend no support to the claim that Du Pont should be ordered to pay appellants' counsel fees. Indeed, the principal authority cited by the appellants states only that if litigation is caused by a trustee's negligence or misconduct, he may not charge the estate with *his* expense in defending the proceeding; there is no suggestion that he must bear the expenses of the challenging party. *See* 3 *Scott on Trusts* §§ 188.4, 188.6, 245 (3d ed. 1967).[12] Even when a trustee has been negligent, he cannot be liable "for attorneys' fees of the excepting party." 90 C.J.S. *Trusts* § 420 at 819 & n.7. Thus, Du Pont cannot, under the appellants' own authorities on the law of trust, be charged with its adversaries' attorneys' fees.

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[12] The two New York state cases cited by the Netter appellants, *In re* Osborne, 18 A.D.2d 973 (1st Dept. 1963), and *In re* Heller, 10 Misc.2d 363 (N.Y. County Sup. Ct. 1948), merely granted allowances from the trust estate for services rendered by counsel. The other authorities cited involved either a New York statute not applicable here (*see* Schenectady Trust Co. v. Emmons, 263 App. Div. 542 (N.Y. 1942)), or the taxation of costs in favor of the prevailing party under a Delaware statute, *see* Kennedy v. Emerald Coal & Coke Co., 30 A.2d 269 (Del. Ch. 1943). None of those cases aids appellants here.

Moreover, the claimed factual premise of appellants' argument is lacking; they are wrong in describing Du Pont's sales to General Motors as antitrust violations. (Netter Brief at 43.) At no time has a court so found. On the contrary, in the Government case, the Supreme Court stated that:

> "[C]onsiderations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best." *United States* v. *du Pont & Co.*, 353 U.S. 586, 606 (1957).
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> * * *
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> "[A]ll concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone. . . ." *Id.*, 353 U.S. at 607.

And in this case, both the district court and this court found that Du Pont had proven that the transactions between the two defendants were "scrupulously fair." [13]

The only violation of antitrust law that was proven arose from Du Pont's ownership of General Motors' stock, which was held to violate Section 7 of the Clayton Act and then only because it presented the threat of a restraint of trade. *Compare Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

III. There Is No Basis For Directing Du Pont To Bear Expenses For Appellants' Final Report To The District Court.

As an afterthought the Netter appellants urge that Du Pont and General Motors should be required to pay the

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[13] *See* Gottesman v. General Motors Corp., 436 F.2d 1205, 1212 (2d Cir. 1971); Gottesman v. General Motors Corp., 279 F. Supp. 361, 369-83 (S.D.N.Y. 1967). Judge Metzner concluded that "[t]here is no evidence in this voluminous record that General Motors could have purchased either finishes or fabrics on terms and conditions, including price, quality and service, more favorable than those received from du Pont." *Id.* at 385.

expenses incurred by the appellants in preparing their final report to the district court. (Netter Brief at 44.) The claim that some benefit (unspecified by appellants) was conferred on Du Pont by the plaintiffs' "investigation" of claims not related to automotive fabrics and finishes is frivolous. Appellants have cited no authority, and we know of none, for the proposition that another party can be required to pay for the cost of work performed by the plaintiff's attorney in deciding that a lawsuit is without sufficient merit to litigate.

Such investigation as plaintiffs' counsel made was undertaken only after Du Pont filed fully documented motions for summary judgment or dismissal of all of plaintiffs' remaining claims. Du Pont willingly made available without formal discovery proceedings all information that plaintiffs' lawyers thought they needed to verify the dispositive information set forth in the affidavits that were filed with those motions.

Moreover, the need to make such an investigation was inherent in plaintiffs' status as stockholders bringing a derivative action. Under Rule 23.1 of the Federal Rules of Civil Procedure, such a case cannot be dismissed without a demonstration that dismissal is in the best interests of the beneficiary corporation and its shareholders. Thus, it was in discharge of their own duty—and not as any favor to Du Pont—that plaintiffs undertook their "investigation." It hardly provides a basis for an assessment of an attorney's fee against Du Pont, which has been forced to bear its own enormous costs of defending a twenty-year lawsuit that has been definitively determined to be without merit.

CONCLUSION

The orders dated April 12, 1977 and July 13, 1977 denying appellants' applications for attorneys' fees and expenses should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the BRIEF OF APPELLEE E. I. du PONT de NEMOURS & COMPANY in the above-captioned action were mailed this 16th day of November, 1977, to each counsel for appellees:

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